(2)

No. 02-687

IN THE

SUPREME COURT OF THE UNITED STATES

SUSAN POOLE, Warden,
Petitioner,
vs.
GLORIA KILLIAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM J. GENEGO*
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, CA 90405
(310) 399-3259

Counsel for Respondent
GLORIA KILLIAN

* Counsel of Record

55 pp

Questions Presented

1. Is this case moot, given that Respondent was unconditionally released and discharged from custody on November 21, 2002, as a result of Petitioner's decision not to request a stay of the court of appeals mandate, and to allow judgment to be issued by the district court in accordance with the mandate, which provided the conditional writ of habeas corpus would issue discharging Respondent from custody unless Petitioner retried Respondent within ninety days?

2. Whether Petitioner's request for summary reversal on the ground that the court of appeals "refused to consider the State's *Teague*" argument should be denied, where the court of appeals did not refuse to consider the State's *Teague* argument, but rather rejected it, and cited in support of its rejection of the State's argument, two decisions of this Court which established that its grant of habeas relief was not based on application of a "new rule" within the meaning of *Teague*?

3. Did the court of appeals correctly conclude that the state court's summary and unexplained denial of Respondent's claim that the prosecutor's use of her post-arrest silence as evidence of her guilt was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio*, 426 U.S. 610 (1976), where the facts of this case are materially indistinguishable from the comparative pertinent facts in *Doyle*, and the state court nevertheless arrived at a result different from *Doyle*?

4. Did the court of appeals correctly conclude that AEDPA's deference did not apply to Respondent's perjured testimony claim, because as a result of the state court's denial of that claim without affording Respondent an evidentiary hearing, the evidence in support of the claim was adduced only at the federal evidentiary hearing, and thus the state court could not have made a proper determination of the merits of the claim?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities v

Statement of the Case 1

I. Certiorari Should Be Denied Because Killian's Unconditional Release and Discharge From Custody Renders Her Petition Moot And Precludes Further Review of the Judgment 10

II. Summary Reversal Is Not Warranted Under *Horn v. Banks*, Because the Court of Appeals Did Not Refuse to Consider the State's *Teague* Argument, But Instead Rejected It 16

III. The State Court's Summary, Unexplained Decision Upholding the Prosecutor's Use of Respondent's Silence As Evidence of Her Guilt Was Contrary to *Doyle v. Ohio* 20

IV. The Court of Appeals Correctly Concluded That AEDPA's Deference to State Adjudications Did Not Apply to Respondent's Perjured Testimony Claim 26

Conclusion 29

INDEX OF APPENDICES

APPENDIX A
Findings and Recommendations of the United States District Court for the Eastern District of California, dated Nov. 14, 2002 ..... A-1

APPENDIX B
Order of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... B-4

APPENDIX C
Judgment of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... C-8

APPENDIX D

Decree of the Court of the Court of Appeals for the Ninth Circuit, dated August 12, 2002 ..... D-9

APPENDIX E

Order of the United States District Court for the Eastern District of California, dated August 7, 2002 ..... E-11

APPENDIX F

Order of the Court of the Court of Appeals for the Ninth Circuit, dated July 30, 2002 ..... F-13

TABLE OF AUTHORITIES

CASES

Burdine v. Johnson,
87 F. Supp. 2d 711 (S.D. Tex. 2000) 12

Burton v. Johnson,
975 F.2d 690 (10th Cir. 1992) 12

Calderon v. Moore,
518 U.S. 149, 116 S. Ct. 2066, 135 L. Ed. 2d 453 (1996) 13, 14

Doyle v. Ohio,
426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) 1, 8, 20

Hoffman v. Arave,
236 F.3d 523 (9th Cir. 2001) 17

Horn v. Banks,
___ U.S. ___, 122 S. Ct. 2147, 153 L. Ed. 2d 301 (2002) 16, 17

In re Hall,
(1981) 30 Cal. 3d 408 19

Kibbe v. DuBois,
269 F.3d 26 (1st Cir. 2001) 24

Lane v. Williams,
455 U.S. 624, 102 S. Ct. 1322, 71 L. Ed. 2d 508 (1982) 13

Maleng v. Cook,
490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) 14

Mancusi v. Stubbs,
408 U.S. 204, 92 S. Ct. 2308, 33 L. Ed. 2d 293 (1972) 13

McMillan v. Gomez,
19 F.3d 465 (9th Cir. 1994) 24

Michael Williams v. Taylor,
529 U.S. 420, 120 S. Ct. 1479, 146 L. Ed. 2d 435 ..... 23, 27, 29

Moore v. Calderon,
56 F.3d 39 (9th Cir. 1995) 14

Spencer v. Kemna,
523 U.S. 1, 118 S. Ct. 978, 140 L. Ed. 2d 43 (1997) 13, 14

Teague v. Lane,
489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) 16, 17, 18

U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership,
513 U.S. 18, 115 S. Ct. 386, 130 L. Ed. 2d 233 (1994) 15

United States v. Agurs,
427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976) 7, 17

United States v. Bagley,
473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985) 17

United States v. Shue,
766 F.2d 1122 (7th Cir. 1985) 24

Weaver v. Thompson,
197 F.3d 359 (9th Cir. 1999) 27

STATUTES AND RULES

28 United States Code

Section 2254 ..... 10, 17

Section 2254(d) 8, 2, 27

Federal Rules of Appellate Procedure

Rule 23(b) 10

Rule 41(a) 10

California Penal Code

Section 1473 19

Statement of the Case

On December 9, 1981, Gary Masse and his cousin Stephen DeSantis carried out a home-invasion robbery in Sacramento, California. In the course of that crime, they murdered Edward Davies and attempted the murder of his wife Grace Davies.[1] Petitioner's Appendix (Pet App) A-2.

Several days later, an anonymous caller to a police hot line identified Masse and DeSantis as the perpetrators. On December 15, detectives interviewed JoAnn Masse, Gary Masse's wife. JoAnn Masse told the detectives the Davies robbery had been initiated and planned by a female named "Gloria," who had enlisted her husband to carry it out. Pet App A-3.

On December 16, police questioned Gloria Killian, who at the time was one semester short of obtaining her J.D. from McGeorge School of Law. The police advised Killian of her *Miranda* rights prior to questioning her, and also provided her a written statement of rights form, which specifically stated, "If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time." Excerpts of Record (ER) 1044. Killian answered questions for approximately two hours, and voluntarily accompanied the police to the station for further questioning. The police placed Killian under arrest at the station, and Killian immediately exercised her right to stop answering questions and remain silent. Reporter's Transcript of Trial

---

[1] The Petition For Writ of Certiorari states incorrectly that both "Grace and Edward Davies were murdered . . ." Petition For Writ of Certiorari ("Petition") at 3.

Proceedings (RT) 39-41; ER 107-08.

Gary Masse was taken into custody on December 17, 1981. Masse and Killian were charged by complaint and as co-defendants with first degree felony murder, attempted murder and related charges. A magistrate dismissed the charges against Killian due to insufficient evidence at the preliminary hearing in May, 1982. Masse was held to answer. Pet App A-3.

Masse was tried before a jury in May, 1983 and convicted of first degree murder. The jury also made a finding of special circumstances, which mandated that Masse's sentence of life imprisonment be without parole. Pet App A-3; Clerk's Record (CR) 2 (Ex I)

Within a matter of days after being sentenced, Masse contacted and met with detectives. Pet App A-3. Masse confirmed that his cousin Stephen DeSantis had committed the Davies robbery with him, and maintained that it was DeSantis who shot and killed Mr. Davies and attempted to kill Mrs. Davies. Gloria Killian had initiated the idea of robbing the Davies, Masse told the detectives. According to Masse, Killian had arranged to be introduced to him through a mutual acquaintance, and then negotiated with him to carry out the robbery, on the condition that she and "her people" get 50 percent of the proceeds. CR 2 (Ex GG)

Detectives located and arrested DeSantis who had been a fugitive since the commission of the crime. Killian, who had remained in the community after the dismissal of the charges against her, was re-arrested on June 16, 1983. The District Attorney charged DeSantis and Killian with first degree felony murder, attempted murder and related crimes. CR 2 (Ex KK 4) DeSantis and Killian were charged as co-defendants, but their cases were severed for trial.

DeSantis was tried first. DeSantis testified in his own behalf and admitted participating in the robbery, but maintained Masse shot the Davies, not him. DeSantis said he had never met Killian. Masse, DeSantis testified, told him it was his wife JoAnn who had tried unsuccessfully to gain entry to the Davies house on an earlier occasion, not Killian, as Masse now claimed. DeSantis was convicted and sentenced to death. Reporter's Transcript of DeSantis Trial (RTD) 10351, 10449, 10370-71; ER 776, 872-778.

After DeSantis' trial, the prosecutor wrote a letter to Masse's sentencing judge, telling the court he planned not to oppose a motion by Masse to strike the special circumstances allegation (which would make Masse parole eligible), subject to Masse's continued cooperation and testimony at Killian's forthcoming trial. The prosecutor never disclosed the letter to Killian. Reporter's Transcript of Evidentiary Hearing (RTEH) 315-317.

Masse's testimony at Killian's trial provided the evidentiary support for the prosecution's theory of the case. Killian was the "mastermind" behind the crime, according to Masse's testimony, who conceived of the idea to rob the Davies, recruited him to execute the idea, and was to get 50 percent of the proceeds. After the robbery-turned- murder was reported on television, Killian called him demanding her half of the proceeds, Masse testified. Pet App A-7, n.6.

Killian's attorney attempted to impeach Masse by asking him to admit he had an agreement with the prosecution which provided that in return for his testimony against Killian, his sentence would be modified. Masse said he hoped his sentence would be modified because he was testifying truthfully, but insisted "there weren't no bargains made." RT 351.

Killian testified in her own defense and denied any involvement in or knowledge of the offense. She testified on direct exam that she answered police questions initially, but stopped when she was placed under arrest. The prosecutor cross-examined Killian about her invocation of silence to suggest it was evidence of her guilt because it meant she had "something to hide." RT 981-982, 995-997.

In summation, the prosecutor deflected defense suggestions that Masse had an allegiance to the prosecution that undermined his credibility, telling the jury, "we have nothing to do with how much time Gary Masse serves." Pet App A-8.

The jury convicted Killian on all counts, and she was sentenced on April 8, 1986, to an overall term of 32 years to life. Pet App A-4

On April 21, Masse wrote the prosecutor's investigator saying he had "a verbal agreement" that in return for incriminating DeSantis and Killian, he would be re-sentenced to "no more then [sic] twelve years." Masse demanded enforcement of the deal, saying that, "I did my part all the way to the end. I even lied my ass off on the stand for you people."[2] Pet App A-7; ER 937-39 (emphasis added)

The investigator gave the letter to the prosecutor, but neither disclosed it to Killian or the court. Reporter's Transcript of Evidentiary Hearing (RTEH) 314-317; ER 737-42

Killian's convictions and the judgment were affirmed on direct appeal in an unpublished opinion filed August 28, 1987. ER 2, 17-21.

Killian filed a petition for a writ of habeas corpus with the California Supreme Court in October, 1996. The state court denied the petition in a one-sentence order filed September 17, 1997. Pet App F-1.

---

[2] Masse's letter included the following: "As far as I am concerned there was a verbal agreement of no more then twelve years. I been as up front and honest as I could be. I gave you DeSantis and Killian. I did my part all the way to the end. I even lied my ass off on the stand for you people....I'm not going for a life sentence. That's bullshit. Please don't make me fight with you people I want to get this over with so I can get down the road....I guess what I have to do is write the judge and let him know every thing that has happened from the very beginning until now. ER 937-39.

Killian's federal petition was filed October 27, 1997. CR 14. The magistrate judge granted Killian's request for an evidentiary hearing as to five of her claims. CR 26, 41, 42. Masse testified at the evidentiary hearing and admitted he intentionally testified falsely at Killian's trial when he denied the existence of a deal. Masse also testified that his trial testimony as to Killian's role and involvement in the offense was false and perjurious. RTEH 251, 261-263, 264, 279. Masse, while admitting his massive perjury, nevertheless maintained Killian was involved in the offense initially, and that he and DeSantis had "stopped using her" before the crime was committed. RTEH 233-234.

The magistrate judge recommended the petition be denied. In particular, the magistrate judge ruled Masse's false trial testimony did not entitle Killian to relief, because while it may have overstated, "from a moral culpability perspective," her "degree of complicity," Masse's new version of Killian's involvement in the offense at the evidentiary hearing meant she was "not actually innocent," and "legal guilt, not degree of moral complicity, is at issue here." Pet App D-29. The district court adopted the magistrate judge's report and denied relief. Pet App E.

The court of appeals reversed, finding Killian was entitled to relief on three individual claims, as well as her cumulative error claim. Pet App A-6-13.

Before concluding Killian was entitled to relief on her perjured testimony claim, the court of appeals explained that because the state court had denied that claim

without granting Killian an evidentiary hearing, the evidence in support of the claim was first adduced at the federal evidentiary hearing. Pet App A-5. As a result, the state court could not have made a proper determination on the merits of that claim in accordance with the evidence presented at the federal evidentiary hearing, and therefore AEDPA's standard of review did not apply. Pet App A-5.

The factual findings of the magistrate judge and district court that Masse's trial testimony against Killian was perjured, both with respect to whether he had a deal to testify against Killian, as well as his testimony as to Killian's role and involvement in the offense were upheld by the court of appeals. Pet App A-6,7. "[T]he evidence indicating the prosecution should have known about Masse's perjury about his alleged deal is significant" the court of appeals noted. Pet App A-6, n.4. The court, however, found it unnecessary to make a finding of that fact because the perjury was sufficiently material to the verdict to entitle Killian to relief under the higher materiality standard that *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976) deemed applicable where testimony or evidence is effectively rendered false by the prosecution's unknowing failure to disclose exculpatory evidence. Pet App A-6.

The court of appeals ruled that Killian was also entitled to relief on her non-disclosure claim. In issuing that ruling, the court of appeals determined that the state court's summary and unexplained denial of the claim amounted to an "unreasonable

application" of the clearly established applicable federal law, under 28 U.S.C. § 2254(d).[3] Pet App A-9-11.

The third ground on which Killian was separately entitled to relief the court of appeals ruled, was her claim that the prosecutor impermissibly used her silence against her, in violation of due process. The state court's summary and unexplained denial of the claim, the court of appeals determined, was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed.2d 91 (1976) Pet App 11, 12. In ruling Killian was entitled to relief on this claim, the court of appeals also considered and rejected Petitioner's argument that the prosecutor's use of Killian's silence did not violate *Doyle's* prohibition because it fit within the "cooperation exception" to *Doyle*. The court of appeals recognized the existence of the cooperation exception, but explained it could not be used here to justify the prosecutor's use of Killian's silence, because the prosecutor used Killian's silence not to rebut a claimed showing of cooperativeness, but instead as evidence of her guilt. Pet App A-11,12.

The court ultimately concluded and ruled that even if these individual claims "were not each sufficient to justify habeas relief," relief would still be required based on Killian's cumulative error claim. "[I]f ever there was a case for application of

---

[3] Petitioner does not dispute the correctness of the grant of relief by the court of appeals on this claim, nor does her petition request that it be overruled, altered or even reviewed.

cumulative error principles," the court explained, "this is it," because "[t]he collective presence of [the separate] errors is devastating to one's confidence in the reliability of this verdict and therefore requires, at the very least, a new trial."[4] Pet App A-13.

---

[4] The court of appeals did not address Killian's additional ground for relief that her trial counsel committed objectively unreasonable errors which individually and collectively prejudiced her, and thus deprived her of her Sixth Amendment right to effective assistance of counsel. Trial counsel's objectively unreasonable and prejudicial errors included his failure to: (1) procure DeSantis' testimony exonerating her from any involvement in the crime; (2) call as a defense the person Masse claimed introduced Killian to him (and who denied doing at DeSantis' trial); (3) present testimony from Gary Smith who, as confirmed by his testimony at the federal evidentiary hearing, would have testified that he and his wife had been solicited to commit the Davies robbery by Robert Hord, a Masse cohort and reputedly head of the Sacramento chapter of an outlaw motorcycle gang; Smith said he declined the offer but did make a silencer at Hord's request, which was found on the gun Masse used in commission of the Davies robbery; (4) impeach Masse with his extensive history of mental illness and drug abuse, which resulted in Masse being found incompetent to testify in his own behalf in an earlier prosecution. ER 7-9.

I.

Certiorari Should Be Denied Because Killian's Unconditional Release and Discharge From Custody Renders Her Petition Moot And Precludes Further Review of the Judgment

Respondent Killian invoked the jurisdiction of the district court pursuant to 28 U.S.C. section 2254. She contended her confinement was in violation of the federal Constitution on the ground that the state court trial which resulted in the conviction responsible for her confinement was constitutionally unfair. By her petition, Killian sought issuance of a conditional writ of habeas corpus, requiring that she be released from custody, unless the state provided her with a new trial within a reasonable time.

On March 13, 2002, the court of appeals filed its decision, and ordered the case "remand[ed] to the district court with instructions to grant the writ unless the state grants Killian a new trial within a reasonable time." Pet App A-13. Petitioner's filing of a petition for rehearing and suggestion of rehearing en banc automatically stayed issuance of the mandate. Fed. R. App. P. 41(a).

Petitioner's rehearing petition was denied August 2, 2002. Pet App B-1. On August 8, 2002, Killian was released on bail pursuant to Fed. R. App. P. 23(b), after posting a monetary bond, and subject to travel and residence restrictions, reporting obligations and other conditions restraining her liberty. Respondent's Appendix ("Resp App") B-6, E-11,12, F-13.

On August 9, 2002, Petitioner advised the district court that she had decided "not to request the Ninth Circuit to stay its mandate requiring [Killian] to be freed unless the State retries her within a reasonable time." Resp App A-1, Resp App B-4. The district court, in response to being advised by Petitioner of this decision, and after receiving the mandate, issued an order implementing the conditional writ of habeas corpus embodied by the court of appeals' mandate. Resp App B-4, Resp App D-9, 10. The district court specifically ordered that "unless formal retrial proceedings are commenced in state court against [Killian] within 90 days of the date on which this Order is filed, [Killian's] bail conditions shall terminate; thus exonerating her bond," resulting in her being discharged form all custodial restraints. Resp App B-6.

The district court's order was filed August 23, judgment was entered that same date, and the ninety day reasonable period of time the state had to initiate retrial proceedings began to run (and would expire November 21). Resp App B-4, C-8. Petitioner again had the choice of requesting a stay (concurrent with a request that the mandate be recalled) or allowing the judgment to be executed, in which case Killian would be discharged in ninety days, unless the State initiated formal retrial proceedings against her.

Petitioner did not seek to have the mandate recalled and stayed.[5] Nor did the State initial retrial proceedings against Killian within the ninety day period set by the district court's order. As a result, as of November 21, Killian's bail was exonerated and terminated, and she was released and discharged from all custodial restraints. As the district court's order explained, termination of Killian's bail conditions and exoneration of her bond would effect her "release," which the district court equated with issuance of the conditional writ. Resp App B-6, 7, n.2 (citations omitted)

Where, as here, a court issues a conditional writ of habeas corpus, and "the state chooses not to act or timely obtain a stay, and fails to cure the error within the deadline established by the federal court in the conditional writ, the writ issues and the prisoner must be released."(citations omitted)) *Burdine v. Johnson*, 87 F. Supp.2d 711, 716 (S.D. Tex. 2000); *Burton v. Johnson*, 975 F.2d 690, 693-694 (10th Cir. 1992)("The District Court's conditional order ended the litigation and left nothing for the court to do but execute its judgment." . . . Neither party appealed the issue and, thus, neither party may raise the

---

[5] Petitioner did file a document ex parte on November 7, 2002, described as "Request For Stay," in which Petitioner stated she did not object to the exoneration of Killian's bond as of November 21, but requested the court require Killian to continue to report weekly by telephone to pretrial services for the stated purpose of making it easier to contact Killian if the state were to decide at some later time to retry her. Resp App A-2. The document cited no rule or statutory authority for its filing or for the relief it requested. Resp App A-2.

The magistrate judge issued a report and findings on November 14, recommending the request be denied for a variety of different reasons, and notified the parties that objections to the report and findings had to be filed within twenty days. Resp App A-3. Petitioner did not file objections within that time.

issue here. The parties have waived any challenge to the remedy. Thus, the remedy will be enforced as it stands.")

Killian's discharge provides the relief sought by her petition and renders it moot because it "no longer present[s] a case or controversy under Article III, § 2, of the Constitution." *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983, 140 L. Ed.2d 43 (1997); *Lane v. Williams*, 455 U.S. 624, 633, 102 S. Ct. 1322, 71 L. Ed.2d 508 (1982)

It is true that a party's "obedience to the mandate of the Court of Appeals and the judgement of the District Court does not [necessarily render a case] moot . . ." *Mancusi v. Stubbs*, 408 U.S. 204, 206-207, 92 S. Ct. 2308, 2310, 33 L. Ed.2d 293 (1972) (footnote omitted) It does in this case, however, because execution of the judgment in accordance with the mandate of the court of appeals, precludes Petitioner from being able to obtain the redress she seeks from a favorable judicial decision. *Spencer v. Kemna*, 523 U.S. at 7, 118 S. Ct. at 983, 140 L. Ed.2d at 50; *Calderon v. Moore*, 518 U.S. 149, 150, 116 S. Ct. 2066, 2067, 135 L. Ed.2d 453 (1996)("an appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant . . .")*quoting*, *Mills v. Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133, 40 L. Ed.2d 293 (1895).

The redress Petitioner seeks from a favorable decision is Killian being returned to prison to serve the remainder of her sentence. The execution of the judgment precludes

Petitioner from being able to obtain that redress, because it resulted in Killian's unconditional release and discharge from all custodial restraints, which thereby terminated the basis for the Court's exercise of jurisdiction over her.[6] *Maleng v. Cook*, 490 U.S. 488, 490-491, 109 S. Ct. 1923, 104 L. Ed.2d 540 (1989)(*per curium*) Having allowed jurisdiction over Killian to lapse, the State may not simply reassert it and take her into custody, absent the issuance of new process, in accordance with law.

Petitioner would not be entitled to, or able to obtain, the redress she seeks from a favorable decision on her petition for another reason. Petitioner does not dispute the correctness of, or seek review of, the Ninth Circuit's ruling that Killian was separately and independently entitled to habeas relief because the state court's denial of her non-disclosure claim was based on an "unreasonable application" of clearly established federal law. Pet App A-9, 11. Consequently, a favorable decision on the petition would not support a reversal of the judgment because it would still be supported by this independent, and unchallenged, basis for the grant of relief.

Because the case is moot, certiorari should be denied. *Spencer v. Kemna*, 523 U.S. at 18, 118 S. Ct. at 988 ("[M]ootness, however, it may have come about, simply deprives us of our power to act; there is nothing for us to remedy, even if we were disposed to do

---

[6] This case is therefore unlike *Calderon v. Moore*, *supra*, because Moore was not discharged from custody due to issuance of the conditional writ, but rather was "release[d] pending appeal," which was Killian's status prior to November 21, 2002. *Moore v. Calderon*, 56 F.3d 39, 40 (9th Cir. 1995)(dissent from order denying stay)

so."); *U.S. Bancorp Mortg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21, 115 S. Ct. 386, 390, 130 L. Ed.2d 233 (1994), *quoting Walling v. Reuter, Co., Inc.*, 321 U.S. 671, 677, 64 S. Ct. 826, 88 L. Ed.2d 1001 (1944) ("'If a judgement has become moot [while awaiting review], this Court may not consider its merits . . . '")

II.

Summary Reversal Is Not Warranted Under *Horn v. Banks*, Because the Court of Appeals Did Not Refuse to Consider the State's *Teague* Argument, But Instead Rejected It

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L. Ed.2d 334 (1989) holds that a federal habeas court may not to grant relief to a state prisoner based a "new rule" of constitutional law. "[F]ederal courts must address the *Teague* question when it is properly argued by the government . . ." *Horn v. Banks*, ___ U.S. ___, 122 S. Ct. 2147, 2148, 153 L. Ed.2d 301, 304 (2002), *citing*, *Caspari v. Bohlen*, 510 U.S. 383, 114 S. Ct. 948, 127 L. Ed.2d 236 (1994)

In *Horn v. Banks, supra*, the Court summarily reversed the Third Circuit because it refused to consider the *Teague* question, even though it was properly argued by the government. 122 S. Ct. at 2149, 153 L. Ed.2d at 306. Petitioner seeks summary reversal in this case based on *Banks*, asserting the Ninth Circuit in this case, like the Third Circuit in *Banks*, "refused to address the *Teague* question." Petition 7.

In *Horn*, the Third Circuit stated affirmatively it was *not* addressing the *Teague* question and explained it was not doing so because it "found '*Teague* not to govern [its] analysis'. . ." *Horn v. Banks*, 122 S. Ct. at 2149, 153 L. Ed.2d at 306, *quoting*, *Banks v. Horn*, 271 F.3d 527, 541, and n.13 (3rd Cir. 2001). This Court summarily reversed, on the

ground that the Third Circuit's ruling that *Teague* did not govern its analysis was incorrect. *Id.*, 122 S. Ct. at 2149. The basis for the summary reversal in *Banks* is not present here because the Ninth Circuit, unlike the Third Circuit, did not find *Teague* inapplicable to its analysis.

The Ninth Circuit has recognized that "[o]nce the state raises the *Teague* defense, [it is] compelled to address whether *Teague* applies before determining the merits of the claim." *Hoffman v. Arave*, 236 F.3d 523, 537 (9th Cir. 2001) Unlike in *Horn v. Banks*, there is no reason to believe that the Ninth Circuit misconstrued the 1996 amendments to 28 U.S.C. § 2254 as altering the applicability of *Teague v. Lane* in post-AEDPA cases. Indeed, had the Ninth Circuit found that Congress had effectuated such an important revision of habeas corpus jurisprudence, it is inconceivable it would have omitted any discussion of this significant development in its written decision.

The decision by the Ninth Circuit establishes that the *Teague* defense, rather than being ignored, was simply rejected by the court based on its conclusion that the rule it was applying was dictated by precedent in existence at the time Respondent's conviction became final. This is established by the panel's citation of decisions of this Court which predate the date Killian's conviction became final on direct review as support for the rule of constitutional law it determined entitled Killian to relief -- *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985) and *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed.2d 342 (1976). Pet App A-6. That the three

judge panel neglected to expressly discuss the *Teague* issue may be explained by the cursory manner in which it was raised by Petitioner in her brief.[7]

In Petitioner's rehearing petition, the *Teague* issue was again raised before the Ninth Circuit. Respondent was ordered by the panel to respond to the petition. The petition was still pending before the Ninth Circuit at the time this Court issued its per curium reversal in *Horn v. Banks*. Although Petitioner failed to notify the Ninth Circuit of this development, a curious omission given Petitioner's current assertion that the Ninth Circuit was guilty of the identical error as the Third Circuit, it is reasonable to assume that the Ninth Circuit was aware of the *Banks* ruling by the time it denied Petitioner's rehearing petition on August 2, 2002. Pet App B-1. Had the panel in fact failed to consider the *Teague* defense at the time of the initial decision, certainly Petitioner's rehearing request would have been granted.

In short, Petitioner's contention that a properly raised *Teague* defense was ignored in this case is unsupported by, and is, in fact, contradicted by, the record.

---

[7] The single sentence in Petitioner's thirty-six page appellate brief to the panel that referenced or cited *Teague* stated the following: "To the extent that Petitioner is attempting to fabricate a claim based solely upon the allegation that Masse lied at trial, such claim would be barred under both 28 U.S.C. § 2254(d)(1) and the rule of *Teague v. Lane*, 489 U.S. 288 (1989)" Appellee's Brief, p. 16. Petitioner did not explain or expand upon that assertion. Petitioner never argued why *Teague* would bar such relief; indeed, Petitioner never identified what new rule she contended would be implicated by granting relief on that basis, much less why it qualified as a new rule.

Assuming without conceding this single sentence is sufficient for the State to have "properly argued" the *Teague* question, the court of appeals adequately addressed it.

The Petition for Certiorari does not request the Court to grant full review on any issue related to *Teague* or its application, and instead specifically requests only that the "Court summarily reverse for reconsideration in light of *Horn v. Banks*." Petition at 7. To the extent the Petition might be deemed to seek relief related to *Teague* other than summary relief in light of *Horn v. Banks*, it should be denied because the Petition cites no basis for granting such review, and none exists.

The decision of the court of appeals in this case is not "in conflict with the decision of another United States court of appeals on the same important matter," and Petitioner does not contend otherwise. Supreme Court Rule 10. Nor can Petitioner seek review on the ground that the court of appeals "decided an important federal question in a way that conflicts with the decision by a state court of last resort," (*Id.*), because the California Supreme Court, as well as California statutory law, recognize the rule that Petitioner contends the federal court should not have applied as a basis for granting Killian relief - - where perjured testimony or other false evidence is presented which is material to the verdict, meaning that there is a reasonable probability the outcome of the trial would have been different had the false evidence not been presented, the defendant is entitled to a new trial, even if the prosecution did not know or have reason to know, the evidence was false. California Penal Code section 1473; *In re Hall* (1981) 30 Cal.3d 408, 424.

III.

The State Court's Summary, Unexplained Decision Upholding the Prosecutor's Use of Respondent's Silence As Evidence of Her Guilt Was Contrary to *Doyle v. Ohio*

This Court's decision in *Doyle v. Ohio*, 426 U.S. 610, 611, 96 S. Ct. 2240, 2241, 49 L. Ed.2d 91 (1976) clearly established that where a defendant is advised of her *Miranda* rights, and thereafter invokes her right not to answer questions, the Due Process Clause prohibits a prosecutor from using the defendant's silence against her at trial.

The police advised Killian of her *Miranda* rights before questioning her, and also provided her with a written statement of rights form, which specifically stated, "If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time." ER 1044. Killian answered questions for approximately two hours, and voluntarily accompanied the police to the station for further questioning. The police placed Killian under arrest at the station, and she immediately exercised her right to stop answering questions and remain silent. RT 39-41.

At trial, the prosecutor used Killian's post-arrest silence against her. He did so by repeatedly questioning her during cross-examination about why she had invoked her right to silence, suggesting it was evidence of her guilt, because it meant she had "something to hide" and that if she "had nothing to hide," she would not have

exercised her right to remain silent and instead explained to the police why she "had nothing to do with this crime[.]"[8]

---

[8] Q: And when you talked to them [the police] you had nothing to hide; did you?

A: No.

Q: And when they arrested you, was there some reason why you decided that you had told them enough?

A: Yes.

Q: What?

A: A person should never speak to anyone without the presence of an attorney.

Q: What did you have to hide.

A: I had nothing to hide.

Q: Why did you stop talking to them?

A: Because that is good sound legal advise.

Q: Isn't it just as good sound legal advise not to talk to them at all?

RT 981-982

An objection to the last question was sustained, but the prosecutor returned to the subject of Killian's silence a short while later in his cross-examination:

Q: Now do you have something to hide when you told the officers you didn't want to talk to them any more?

A: No.

Q: Wasn't it a fact that because Virgil Fletcher had not been arrested you figured you could have done the same thing, and when you couldn't talk your way past them you decided not to say anymore? Isn't that what happened?

A: I refused to talk to them anymore because they had placed me under arrest. It was obvious that they didn't --

Q: Didn't you feel like, hey, wait a minute, I can explain this?

A: There is no point to continue to talk after you have been arrested.

Q: How do you know that?

A: From law school.

Q: You learned that in law school?

A: That is the first piece of advice you learn in criminal law. It is best to have an attorney present.

Q: Uh-huh. Well, why didn't you -- my question remains though, if you had nothing to hide, why didn't you explain to the officers further, try and explain to them further so that they would understand that you had nothing to do with this crime?

Killian alleged in her state court habeas petition that the prosecutor's use of her post-arrest invocation of her right to remain silent contravened this Court's decision in *Doyle*. The state court summarily denied the claim, without explanation, in a one-sentence order. Pet App F-1. The Ninth Circuit afforded the state court's adjudication of Killian's *Doyle* claim the deference required by 28 U.S.C. § 2254(d). The court concluded the state court's "determination of this issue . . . was contrary to established Supreme Court law," and thus ruled the violation of Killian's due process rights under *Doyle* entitled her to habeas relief under 28 U.S.C. § 2254(d). Pet App A-12.

Petitioner seeks *certiorari* review of this decision on the ground that it "conflicts with *Williams v. Taylor*, 529 U.S. 362, 412 (2000), because it fails to apply the standards set by this Court for evaluating state court adjudications," and "also conflicts with *Kibbe v. Dubois*, 269 F.3d 26 (1st Cir. 2001) on the same issue." Petition at 8.

Defense counsel objected again and the objection was sustained. In addition to sustaining the objection, the trial judge called the attorneys to side-bar and expressed his concern about the examination:

THE COURT: Kit, I just have some concern about pressing -- I just remember some case that said that if someone wants to avail themselves of their right not to, to say, testify or raise the Fifth Amendment, that to do so is not to be used to presume that they are hiding something.

MR. CLELAND: I understand that. The way it has been developed by them I feel there is some redress.

THE COURT: I think you are treading on very dangerous ground and you could end up with a real problem.

MR. CLELAND: I understand.

RT 995-997

The Ninth Circuit correctly determined that under the standards this Court articulated in *Michael Williams v. Taylor, supra,* for evaluating state court decisions under section 2254(d), the state court's unexplained denial of Killian's claim was "contrary to" clearly established federal law as determined by this Court's decision in *Doyle v. Ohio, supra.* "A state-court decision [is] . . . contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Michael Williams v. Taylor*, 529 U.S. at 426, 120 S. Ct. at 1519-1520.

The facts of this case are materially indistinguishable from the facts of this Court's decision in *Doyle* because in this case, as in *Doyle*: (1) Killian was advised by police that she had the right to remain silent; (2)she was advised that if she invoked that right, her silence could not be used against her at trial; (3) she invoked her right to silence; and (4) the prosecution used her silence against her at trial, contrary to what she was advised before she invoked the right to remain silent.

Petitioner contends that *Doyle* does not compel a result contrary to the state court's denial of Killian's claim because the facts of this case are "materially distinguishable" from *Doyle*. Petition at 11. The single fact Petitioner cites in support of that contention is that Killian "attempted to portray herself as cooperative during questioning." Petition at 11.

There is circuit court authority for the proposition that a defendant's attempt to portray herself as cooperative, as Killian is claimed to have done here, allows the prosecutor to question the defendant to rebut the showing of cooperativeness. This is the same argument Petitioner made to the court of appeals - - that the prosecutor's contravention of *Doyle's* prohibition against a prosecutor using a defendant's silence against her at trial was rendered permissible in this case by the "cooperation exception" to *Doyle*. The "cooperation exception" provides that "when a defendant has created the impression through his testimony and defense presentation that he fully cooperated with the authorities when, in fact, he had not," a prosecutor may rebut his claimed showing of cooperation. *Kibbe v. DuBois*, 269 F.3d 26, 34 (1st Cir. 2001)

The Ninth Circuit acknowledged the existence of the cooperation exception under circuit court law, including its own decision in *McMillan v. Gomez*, 19 F.3d 465 (9th Cir. 1994). Pet App A-12. It explained the exception did not apply here, however, because the prosecutor's use of Killian's silence exceeded the permissible bounds of the cooperation exception. The prosecutor did not use Killian's silence "to refute the impression of cooperativeness," but as evidence of guilt. As the First Circuit explained in finding the cooperation exception inapplicable in *Kibbe*, "[t]he Commonwealth, having emphasized Kibbe's silence to suggest that his story was 'not worthy of believing,' cannot now justify its actions through the safe harbor of the cooperation exception to *Doyle's* prohibition." 269 F.3d at 35; *United States v. Shue*, 766 F.2d 1122,

1130 (7th Cir. 1985)("[W]hile the government may use a defendant's post-arrest silence to impeach testimony about the circumstances of an arrest, the government may not then argue that the defendant's silence was inconsistent with this claim of innocence.")

Petitioner concedes that the prosecutor violated the scope of the cooperation exception, and contravened *Doyle*, if he used Killian's silence to do more than rebut her claimed showing of cooperativeness. Petition at 11. The issue here then turns on whether the prosecutor's questions to Killian during cross-examination about her invocation of silence were limited to showing she was not cooperative.

To rebut Killian's claimed showing of cooperativeness, the prosecutor only needed to establish that Killian stopped answering questions. Killian readily admitted that fact. The prosecutor's questions to Killian about her silence far exceeded eliciting evidence of uncooperativeness; they used Killian's silence against her as evidence of guilt. Given the nature of the prosecutor's questions, it would be objectively unreasonable to conclude otherwise.

Accordingly, Petitioner's attempt to justify the prosecutor's use of Killian's silence against her at trial by reliance on the cooperation exception to *Doyle's* prohibition fails. That failure also dooms Petitioner's attempt to demonstrate that the state court's denial of Killian's claim was not "contrary to" *Doyle's* prohibition, as the Ninth Circuit correctly determined.

IV.

The Court of Appeals Correctly Concluded That AEDPA's Deference to State Adjudications Did Not Apply to Respondent's Perjured Testimony Claim

Killian's state petition stated as a ground for relief that her conviction was based on perjured testimony, given by Masse, in violation of due process. The state court ruled on and summarily denied that claim without affording Killian an evidentiary hearing. Pet App F-1.

Killian restated that same ground for relief in her federal petition. The federal magistrate judge granted Killian's request for an evidentiary hearing, ruling that it was necessary for a proper determination of the claim. At the federal evidentiary hearing, Killian called Masse as a witness. Masse's testimony and other evidence presented at the hearing, proved that Masse provided perjured testimony at Killian's trial with respect to whether he had a deal, i.e., his "motivation to testify at Killian's trial," and that his perjury also extended to his testimony with respect to Killian's role and involvement in the offense, i.e., "the very heart of whether and to what extent Killian was involved" in the crime. Pet App A-7.

Because the state court denied Killian an evidentiary hearing on her perjured testimony claim, the court of appeals explained, the evidence in support of the claim was first adduced at the federal evidentiary hearing. Pet App A-5. And because the evidence in support of the claim was first adduced at the federal evidentiary hearing, the court of appeals further explained, the state court obviously could not have made a proper determination on the merits of the perjured testimony claim in accordance with the evidence presented at the federal evidentiary hearing. *Id.*

This made AEDPA deference inapplicable to Killian's perjured testimony in two respects, the court ruled. "AEDPA deference does not apply to Killian's perjury testimony claim in this case," the court stated, "because the state courts could not have made a proper determination on the merits." Additionally, "[h]aving refused Killian an evidentiary hearing on the matter, the state court cannot argue now that the normal AEDPA deference is owed the factual determinations of the California courts." *citing, Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999), *cf. Michael Williams v. Taylor*, 529 U.S. 420, 444, 120 S. Ct. 1479, 146 L. Ed.2d 435 (state court denial of evidentiary hearing establishes cognizable cause for procedural default in not presenting claims to state court); *see* 28 U.S.C. § 2254(d)(AEDPA's standard of review only applies to a "claim that was adjudicated on the merits in State court proceedings . . ."

Petitioner's argument that this ruling of the court of appeals was in error, and should be reviewed by this Court on *certiorari*, is based on two incorrect assertions.

First, Petitioner incorrectly asserts "the Ninth Circuit observed that an evidentiary hearing was held in federal court, and that therefore, 'AEDPA's standard of review does not apply.'" Petition at 15, *quoting* Pet App A-5. The Ninth Circuit did not rule, state or suggest that AEDPA's standard of review did not apply because "an evidentiary hearing was held in federal court . . ." Petition at 15. Indeed, the complete sentence of the opinion that Petitioner partially quotes in making this incorrect assertion reads, "For claims for which no adjudication on the merits in state court was possible, however, AEDPA's standard of review does not apply." Pet App A-5 (emphasis added to the part of sentence quoted by Petitioner)

Second, Petitioner incorrectly asserts that "[n]o facts came to light in the federal evidentiary hearing that were not alleged in and assumed to be true by the state court." Petition at 17 (footnote omitted). This assertion reflects either a disturbing disregard for the record, or a degree of unfamiliarity with the record that is unbelievable. Most significantly, it was not until the evidentiary hearing that facts proving that Masse's trial testimony regarding Killian's role and involvement in the offense was perjured were established. Pet App D-18 & 19, n.7 ("[T]he court has held an evidentiary hearing, and facts presented to the supreme court have been clarified and supplemented herein. It is not possible to employ a deferential standard of review to application of law to facts, when the facts at issue before the state supreme court were not precisely the same as the supplemented facts before this court."(footnote omitted)

Conclusion

The petition should be denied because the case is moot. Alternatively, it should be denied because :

The Ninth Circuit, unlike the Third Circuit in *Horn v. Banks*, did not refuse to address the State's *Teague* argument, but rather considered it and rejected it; there is no basis then for granting Petitioner's request for summary reversal in light of *Banks;*

The Ninth Circuit correctly applied the standards this Court articulated in *Michael Williams v. Taylor*, for reviewing state court decisions under section 2254(d), in determining that the state court's summary and unexplained denial of Killian's claim that the prosecutor impermissibly used her silence against her at trial in violation of due process was "contrary to" this Court's decision in *Doyle v. Ohio;*

Given that the state court denied Killian an evidentiary hearing, and consequently the facts in support of her perjured testimony claim were first adduced at the federal evidentiary hearing, the Ninth Circuit correctly concluded that AEDPA's deference did not apply to that claim because the state court could not have adjudicated it on the merits in accordance with the evidence presented and facts proved at the federal evidentiary hearing.

Respectfully submitted,

William J. Genego, Esq.
Nasatir, Hirsch, Podberesky & Genego
2115 Main Street
Santa Monica, California 90405
310-399-3259
Attorneys for Respondent
Gloria Killian

INDEX OF APPENDICES

Page

APPENDIX A
Findings and Recommendations of the United States District Court for the Eastern District of California,, dated November 14, 2002 ..... A-1

APPENDIX B
Order of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... B-4

APPENDIX C
Judgment of the United States District Court for the Eastern District of California, dated August 23, 2002 ..... C-8

APPENDIX D
Decree of the Court of the Court of Appeals for the Ninth Circuit, dated August 12, 2002 ..... D-9

APPENDIX E
Order of the United States District Court for the Eastern District of California, dated August 7, 2002 ..... E-11

APPENDIX F
Order of the Court of the Court of Appeals for the Ninth Circuit, dated July 30, 2002 ..... F-13

APPENDIX A

APPENDIX A

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN,

Petitioner,

v.

SUSAN POOLE, Warden,

Respondent.

_____/

No. CIV. S-97-2024 GEB GGH P

FINDINGS AND RECOMMENDATIONS

Filed November 14, 2002

On August 23, 2002, the district judge issued an order of judgment pursuant to a Ninth Circuit mandate, received August 14, 2002, that this court grant petitioner's writ "'unless the state grants Killian a new trial within a reasonable time.'" See Order, filed August 23, 2002, p. 2. A separate judgment was entered the same day. The order allowed the state 90 days (from August 23, 2002) to determine whether to retry petitioner; if, after 90 days, the state does not commence formal retrial proceedings, bail conditions are to terminate and petitioner's bond is to be exonerated. Should, on the other hand, the state commence retrial procedures within the 90-day period, the federal bail order was to become ineffective as set forth in the order of the undersigned filed August 7, 2002.

On November 7, 2002, respondent filed an ex parte request for a stay of the judgment seeking to extend for 60 days the termination of bail conditions, now due to expire on November 21, 2002

(90 days from August 23, 2002), to allow the state more time to determine whether to initiate a new prosecution. Respondent asks that the bond be exonerated pursuant to the August 23, 2002 order but seeks to have the termination of the condition that petitioner report weekly to pretrial services be stayed for an additional 60 days beyond the pending November 21, 2002 deadline. This request is made by respondent for the avowed purpose of assuring that if the state decides to pursue another prosecution, petitioner can be conveniently located. Respondent also references a pending petition for certiorari in the Supreme Court.

Respondent sets forth no authority for a district court to stay a judgment pending a petition for a writ of certiorari in the United States Supreme Court. Fed. R. App. P. 8 applies to stays of matters on "appeal." Staying a mandate of a Ninth Circuit decision pending certiorari to the Supreme Court must be by Fed. R. app. P. 41, and only the Circuit court can grant such a stay. See also Supreme Court Rule 23 (authorizing an application to a Supreme Court justice for a stay of enforcement of a judgment when a party is seeking review of that judgment.[1]

Respondent's motion is more properly framed as a request for a modification of the judgment, rather than for a stay. A notice motion must be made under Fed. R. Civ. P. 60(b) for modification of a judgment, and the motion must meet the prerequisites of Rule 60(b). Judgment cannot be modified simply upon an ex parte stay request by respondent.

Accordingly, IT IS HEREBY RECOMMENDED that respondent's November 7, 2002 ex parte request for a stay of a portion of the district court's August 23, 2002 judgment order be denied

---

[1] Under a former incarnation of Rule 23, Supreme Court Rule 44, a party might seek a stay from the district court in such a context as this. However, the change of wording in Rule 23 appears to require that a court staying judgment pending review by the Supreme Court have independent authority to enter a stay.

PUBLISHER'S NOTE:

Page(s) A-3 **missing in original.**

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN, Petitioner, v. SUSAN POOLE, Warden, Respondent.	**CIV. S-97-2024 GEB GGH P** **ORDER**

Filed August 23, 2002

On August 9, 2002, Respondent lodged a proposed Order advising the court of her decision not to request the Ninth Circuit to stay its mandate requiring the Petitioner to be freed unless the State retries her within a reasonable time. In addition, Respondent requests that the order which the District Court issues conditionally granting the writ allow time for the State of California to decide whether to file a petition for writ of certiorari in the United States Supreme Court, and for the Sacramento County District Attorney's Office to determine whether to retry Petitioner. Respondent asserts that since she has until October 31, 2002, to file a petition for writ of certiorari, and because of the uncertainty attendant to that possible filing, she should not be required to notify the Court about whether the Sacramento County District Attorney intends to retry Petitioner until the period within 30 days after denial of the petition, or within 30 days after the decision is made not to file a

petition. Respondent asserts that although the Sacramento County District Attorney's Office has begun reviewing the case to determine whether to retry Petitioner, it would be premature for that office to initiate further state proceedings against Petitioner since the State is still considering whether a writ of certiorari will be filed in the United States Supreme Court.

Respondent does not indicate when trial proceedings are likely to commence. Respondent does shed light on factors involved with that decision by mentioning the lengthy passage of time since the trial in this case and the difficulties the Sacramento County District Attorney's Office anticipates locating witnesses and gathering physical evidence. Respondent also states that the Sacramento County District Attorney's Office stated "that an investigator will shortly be assigned to the case." (Proposed Order at 2.)

The Ninth Circuit mandate, which was received August 14, 2002, remanded this case "to the district court with instructions to grant the writ unless the state grants Killian a new trial within a reasonable time." Killian v. Poole, 282 F.3d 1204, 1211-12 (9th Cir. 2002).

> Federal courts pursuant to their authority to dispose of habeas matters as "law and justice require" often delay a state prisoner's release from custody for a reasonable time to allow the state an opportunity to correct the constitutional defects that make the custody unlawful.

Moore v. Zant, 972 F.2d 318, 320 (11th Cir. 1992). The Ninth Circuit's instructions require the District Court to accord the State of California a reasonable opportunity to decide whether Petitioner should be retried before a release order issues. See Collazo v. Estelle, 940 F.2d 411, 426 (9th Cir. 1991), cert. denied, 502 U.S. 1031 (1992) (case "remanded to the district court to issue writ and to determine a reasonable time in which the State of California [was to] retry the petitioner . . . or release him"); see also Irvin v. Dowd, 366 U.S. 717, 729 (1961) (where the Supreme Court reveals

that "on remand, the District Court should enter such orders as are appropriate and consistent with [remand instructions] which allow the State a reasonable time in which to retry petitioner.").

Respondent indicates that the State should be allowed to make the retrial decision late this year or after its writ of certiorari is denied. It is uncertain when that would occur. Respondent argues as follows when contending this position is consistent with the Ninth Circuit's instructions:

> The Ninth Circuit's opinion in this case instructs this Court to "grant the writ unless the state grants Killian a new trial within a reasonable time." Given the wide range of procedural avenues that are available in this case, respondent submits that it is "reasonable" for this Court's order to allow and account for those various possibilities.

(Proposed Order at 2.)

The Ninth Circuit's mandate contemplated that the State would be provided with a "reasonable time" only to undertake the investigation pertinent to the retrial decision. The question is how much time the State needs to conduct that investigation. Since this case concerns crimes committed 21 years ago, the state needs time to conduct its investigation.[1] Given the passage of time since this case was tried, the State's asserted difficulty in determining whether it should retry Petitioner, and the amount of time that has passed since the Ninth Circuit's mandate was received, the State will be provided time to make its decision whether Petitioner will be retried. But unless formal retrial proceedings are commenced in state court against Petitioner within 90 days of the date on which this Order is filed, Petitioner's bail conditions shall terminate; thus exonerating her bond.

---

[1] As stated in Vasquez v. Hillary, 474 U.S. 254, 280 (986), "long delays effectively eliminate the State's ability to reconstruct its case . . . . [T]he passage of time may make the right to retry the defendant a 'matter of theory only . . . .' Witnesses die or move away; physical evidence is lost; memories fade. For these reasons, the [Supreme] Court has noted that '[t]he greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.'" (Citations omitted.)

If the State commences retrial proceedings against Petitioner within this 90 day period, the federal bail order becomes ineffective as stated in the magistrate judge's order filed August 7, 2002.[2]

The clerk shall enter judgment forthwith.

IT IS SO ORDERED.

DATED: August 22, 2002

s/ GARLAND E. BURRELL, JR.

U.S. District Judge

---

[2] This decision just concerns Petitioner's release status, because "the state may ordinarily still rearrest and reprosecute [a suspect]. See Carter v. Rafferty, 781 F.2d 993, 998 (3rd Cir. 1986) (effect of granting writ was to release petitioner from custody from constitutionally unfair trial but did not impede right to retry defendant); Gardner v. Pitchess, 731 F.2d 637, 640 (9th Cir. 1984) (granting of writ of habeas corpus does not preclude retrial of defendant); United States ex rel. Craig v. Myers, 329 F.2d 856, 860 (3rd Cir. 1964 (same); United States ex rel. Lowry v. Case, 283 F. Supp. 744, 745 (E.D. Pa. 1968 (same)." Moore, 972 F.2d at 320. See also Foster v. Lockhart, 9 F.3d 722, 727-28 (8th Cir. 1993) (same).

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

GLORIA KILLIAN

CASE NUMBER:
CIV S-97-2024 GEB GGH P

v.

SUSAN POOLE

Filed August 23, 2002

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF AUGUST 23, 2002.

Jack L. Wagner,

Clerk of the Court

ENTERED: August 23, 2002

by: s/ K. Carlos, Deputy Clerk

APPENDIX D

APPENDIX D

Office of the Clerk

United States Court of Appeals for the Ninth Circuit

95 Seventh Street, P.O. Box 193939

San Francisco, CA 94119-3939

August 12, 2002

USDC, Sacramento

Eastern District of California (Sacramento)

Room 4-200

501 "I" Street

Sacramento, CA 95814

C.A. No.	TITLE	AGENCY/ D.C. NO.
00-16477	Killian v. Poole	CV-97-02024-GEB-GGH

Dear Clerk:

The following documents(s) in the above listed cause(s) is (are) being sent to you under cover of this letter.

[x] Certified copy of the Decree of the Court

[ ] Judgment of the National Labor Relations Board

[ ] Certified copy of the Entry of Dismissal

The record on appeal will follow under separate cover.

Please acknowledge receipt on the enclosed copy of this letter.

Very truly yours,

Cathy A. Catterson

Clerk of the Court

By: Fred Taylor

Deputy Clerk

Enclosure(s)

cc: ALL COUNSEL

APPENDIX E

APPENDIX E

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

GLORIA KILLIAN,

Petitioner,

v.

SUSAN POOLE, Warden,

Respondent.

/

CIV. S-97-2024 GEB GGH P

ORDER

Filed August 7, 2002

The Ninth Circuit has ordered petitioner in the above captioned action to be released with appropriate conditions pending further federal proceedings. This order shall be effective until such time as the State has commenced retrial proceedings, or has determined that petitioner shall be permanently released without retrial.[1]

Petitioner shall be released on the following conditions:

1. That she post a bond in the amount of $200,000.00 to be secured by the residence owned by Sally Ride located at 1249 North Holliston Ave., Pasadena, California 91104. Appropriate papers as discussed in court are to be filed by August 21, 2002; however, this release order shall be

[1] Once the state courts assumed jurisdiction over petitioner pursuant to the judgment of t his court, the federal courts would no longer have jurisdiction over petitioner's release or reincarceration.

effective on August 8, 2002.[2]

2. Petitioner is released to the third party custody of Joyce Ride; petitioner shall reside in the home of Ms. Ride, also located at 1249 North Holliston Ave., Pasadena, CA., and not change her residence absent approval by this court.

3. Petitioner shall not possess a firearm, destructive device, or other dangerous weapon.

4. Petitioner's travel is limited to the Central and Eastern Districts of California absent approval of other travel by Pretrial Services;

5. Petitioner shall not have possession of, or use, a narcotic drug or other controlled substance absent a prescription by a licensed medical practitioner; she shall abstain from the excessive use of alcohol. Petitioner shall notify Pretrial Services immediately of any prescriptions.

6. Petitioner shall report to Pretrial Services (Sacramento) on the first working day following her release from custody. Either Ms. Ride, or petitioner's counsel, shall accompany Ms. Killian to her first Pretrial Services contact. Petitioner shall abide by the rules and regulations of the Pretrial Services Agency.

Respondent's counsel shall cause this order to be personally communicated to the Warden where petitioner is presently incarcerated.

DATED: August 7, 2002.

s/ GREGORY G. HOLLOWS

UNITED STATES MAGISTRATE JUDGE

---

[2] If a logistical impediment precludes the use of the Ride property from being used as security, the court will reconsider this condition.

APPENDIX F

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GLORIA KILLIAN,	)	No. 00-16477
	)	
Petitioner-Appellant,	)	D.C. No.
	)	CV-97-02024-GEB-GGH
v.	)	Eastern District of California-
	)	Sacramento
SUSAN POOLE, Warden,	)	
	)	
Respondent-Appellee.	)	ORDER
	)	

Filed July 30, 2002

Before: HUG, D.W. NELSON and HAWKINS, Circuit Judges

The Motion of Petitioner Killian for release is granted, subject to such appropriate conditions of release as may be established by the district court. The district court shall hold a hearing thereon within 30 days of the filed date of this Order.

SO ORDERED.